

FILED IN THE
U.S. DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

Mar 01, 2018

SEAN F. McAVOY, CLERK

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ELIZABETH STROCSHER,

No.1:17-CV-03078-JTR

Plaintiff,

**ORDER GRANTING PLAINTIFF'S
MOTION FOR SUMMARY
JUDGMENT**

**COMMISSIONER OF SOCIAL
SECURITY,**

Defendant.

BEFORE THE COURT are cross-motions for summary judgment. ECF 14, 15. Attorney D. James Tree represents Elizabeth Strocsher (Plaintiff); Trial Assistant United States Attorney Ryan Ta Lu represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. ECF No. 7. After reviewing the administrative record and the motions filed by the parties, the Court **GRANTS, in part**, Plaintiff's Motion for Summary Judgment; **DENIES** Defendant's Motion for Summary Judgment; and **HANDS** the matter to the Commissioner for additional proceedings pursuant to 42 U.S.C. § 405(g).

JURISDICTION

Plaintiff filed an application for Supplemental Security Income (SSI) on

1 October 17, 2012 and an application Disability Insurance Benefits (DIB) on
2 October 30, 2012, Tr. 86-87. She alleged disability as of April 7, 2007, Tr. 276,
3 283, due to mild scoliosis, epilepsy, migraines, anemia, and stomach problems, Tr.
4 315. The applications were denied initially and upon reconsideration. Tr. 164-70,
5 174-87. Administrative Law Judge (ALJ) Gordon W. Griggs held a hearing on
6 January 12, 2015 and heard testimony from Plaintiff and vocational expert,
7 Kimberly Mullinax. Tr. 32-61. At this hearing, Plaintiff amended her onset date
8 to June 1, 2010. Tr. 38. The ALJ issued an unfavorable decision on January 30,
9 2015. Tr. 140-52. The Appeals Council remanded the decision to the ALJ for
10 additional proceedings on September 18, 2015. Tr. 158-62.

11 The ALJ held a second hearing on July 20, 2016 and heard additional
12 testimony from Plaintiff, medical expert, Don R. Clark, M.D., and vocational
13 expert, Mark Harrington. Tr. 62-85. The ALJ issued a partially favorable decision
14 on August 31, 2016 finding Plaintiff disabled as of August 27, 2014, but not
15 disabled prior. Tr. 14-23. The Appeals Council denied review on February 23,
16 2017. Tr. 1-6. The ALJ's August 31, 2016 decision became the final decision of
17 the Commissioner, which is appealable to the district court pursuant to 42 U.S.C. §
18 405(g). Plaintiff filed this action for judicial review on April 27, 2017. ECF Nos.
19 1, 4.

20 **STATEMENT OF FACTS**

21 The facts of the case are set forth in the administrative hearing transcript, the
22 ALJ's decision, and the briefs of the parties. They are only briefly summarized
23 here.

24 Plaintiff was 33 years old at the amended date of onset. Tr. 276. She
25 completed the twelfth grade in 1996. Tr. 316. Her reported work history includes
26 the jobs of call center customer service representative, cashier, front desk clerk,
27 sandwich maker, and sales representative. Tr. 316, 326. Plaintiff reported that she
28 stopped working on November 15, 2007 due to her conditions. Tr. 315. After

1 applying for benefits, she worked part-time as a cashier at K-Mart, Tr. 40, 308,
2 374, 607, and as an online customer service representative, Tr. 41, 45, 304.

3 **STANDARD OF REVIEW**

4 The ALJ is responsible for determining credibility, resolving conflicts in
5 medical testimony, and resolving ambiguities. *Andrews v. Shalala*, 53 F.3d 1035,
6 1039 (9th Cir. 1995). The Court reviews the ALJ's determinations of law de novo,
7 deferring to a reasonable interpretation of the statutes. *McNatt v. Apfel*, 201 F.3d
8 1084, 1087 (9th Cir. 2000). The decision of the ALJ may be reversed only if it is
9 not supported by substantial evidence or if it is based on legal error. *Tackett v.*
10 *Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999). Substantial evidence is defined as
11 being more than a mere scintilla, but less than a preponderance. *Id.* at 1098. Put
12 another way, substantial evidence is such relevant evidence as a reasonable mind
13 might accept as adequate to support a conclusion. *Richardson v. Perales*, 402
14 U.S. 389, 401 (1971). If the evidence is susceptible to more than one rational
15 interpretation, the court may not substitute its judgment for that of the ALJ.
16 *Tackett*, 180 F.3d at 1097. If substantial evidence supports the administrative
17 findings, or if conflicting evidence supports a finding of either disability or non-
18 disability, the ALJ's determination is conclusive. *Sprague v. Bowen*, 812 F.2d
19 1226, 1229-30 (9th Cir. 1987). Nevertheless, a decision supported by substantial
20 evidence will be set aside if the proper legal standards were not applied in
21 weighing the evidence and making the decision. *Brawner v. Secretary of Health*
22 and Human Services, 839 F.2d 432, 433 (9th Cir. 1988).

23 **SEQUENTIAL EVALUATION PROCESS**

24 The Commissioner has established a five-step sequential evaluation process
25 for determining whether a person is disabled. 20 C.F.R. §§ 404.1520(a),
26 416.920(a); *see Bowen v. Yuckert*, 482 U.S. 137, 140-42 (1987). In steps one
27 through four, the burden of proof rests upon the claimant to establish a *prima facie*
28 case of entitlement to disability benefits. *Tackett*, 180 F.3d at 1098-99. This

1 burden is met once the claimant establishes that physical or mental impairments
2 prevent her from engaging in her previous occupations. 20 C.F.R. §§
3 404.1520(a)(4), 416.920(a)(4). If the claimant cannot do her past relevant work,
4 the ALJ proceeds to step five, and the burden shifts to the Commissioner to show
5 that (1) the claimant can make an adjustment to other work, and (2) specific jobs
6 which the claimant can perform exist in the national economy. *Batson v. Comm'r*
7 *of Soc. Sec. Admin.*, 359 F.3d 1190, 1193-94 (9th Cir. 2004). If the claimant
8 cannot make an adjustment to other work in the national economy, a finding of
9 "disabled" is made. 20 C.F.R. §§ 404.1520(a)(4)(v), 416.920(a)(4)(v).

10 ADMINISTRATIVE DECISION

11 On August 31, 2016, the ALJ issued a decision finding Plaintiff was
12 disabled as defined in the Social Security Act as of August 27, 2014, but not
13 disabled prior to this date.

14 At step one, the ALJ found Plaintiff had not engaged in substantial gainful
15 activity since June 1, 2010, the amended date of onset. Tr. 17.

16 At step two, the ALJ determined Plaintiff had the following severe
17 impairments prior to August 27, 2014: migraine headaches; Crohn's disease;
18 seizure like events, probably anxiety vs epilepsy. Tr. 18. As of August 27, 2014,
19 the ALJ determined that these severe impairments continued, and he added the
20 severe impairment of rectal cancer. *Id.*

21 At step three, the ALJ found that prior to August 27, 2014 Plaintiff did not
22 have an impairment or combination of impairments that met or medically equaled
23 the severity of one of the listed impairments. Tr. 18. The ALJ found that as of
24 August 27, 2014, Plaintiff's impairments medically equaled listing 13.18C. Tr. 22.

25 At step four, the ALJ assessed Plaintiff's residual function capacity prior to
26 August 27, 2014 and determined she could perform a range of work at a light
27 exertional level with the following limitations:

1 the claimant could never climb ladders, ropes, or scaffolds. The
2 claimant could occasionally climb ramps and stairs. She could
3 occasionally stoop, kneel, crouch, and crawl. The claimant was limited
4 to occasional exposure to extremely bright light and very loud noise.
5 The claimant should avoid hazardous conditions such as proximity to
6 unprotected heights, moving machinery, sharp objects, open water, and
hot surfaces. The claimant must work within a 5-minute walk of
sanitary restroom facilities.

7 Tr. 19. The ALJ identified Plaintiff's past relevant work as customer service
8 representative, cashier II, hotel clerk, sandwich maker, office helper, child monitor,
9 sales attendant, and receptionist. Tr. 22. The ALJ then concluded that prior to
10 August 27, 2014, Plaintiff was able to perform the past relevant work of customer
11 service representative, office helper, sales attendant, receptionist, and cashier II.
12 *Id.*

13 The ALJ did not make a step five determination and concluded Plaintiff was
14 not under a disability within the meaning of the Social Security Act at any time
15 from June 1, 2010 through August 26, 2014 and was disabled as of August 27,
16 2014. Tr. 22-23.

17 ISSUES

18 The question presented is whether substantial evidence supports the ALJ's
19 decision denying benefits and, if so, whether that decision is based on proper legal
20 standards. Plaintiff contends the ALJ erred by (1) failing to properly weigh the
21 medical source opinions and (2) failing to properly address Plaintiff's symptom
22 statements.

23 DISCUSSION

24 1. Medical Opinions

25 Plaintiff argues the ALJ failed to properly consider and weigh the medical
26 opinions expressed by Venu Bellum, M.D., Richard Sloop, M.D, Jennifer Schultz,
27 Ph.D., and John F. Robinson, Ph.D. ECF No. 14 at 15-20.

28 In weighing medical source opinions, the ALJ should distinguish between

1 three different types of physicians: (1) treating physicians, who actually treat the
2 claimant; (2) examining physicians, who examine but do not treat the claimant;
3 and, (3) nonexamining physicians who neither treat nor examine the claimant.
4 *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1995). The ALJ should give more
5 weight to the opinion of a treating physician than to the opinion of an examining
6 physician. *Orn v. Astrue*, 495 F.3d 625, 631 (9th Cir. 2007). Likewise, the ALJ
7 should give more weight to the opinion of an examining physician than to the
8 opinion of a nonexamining physician. *Id.*

9 When a treating physician's opinion is not contradicted by another
10 physician, the ALJ may reject the opinion only for "clear and convincing" reasons.
11 *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991). When a treating
12 physician's opinion is contradicted by another physician, the ALJ is only required
13 to provide "specific and legitimate reasons" for rejecting the opinion. *Murray v.*
14 *Heckler*, 722 F.2d 499, 502 (9th Cir. 1983). Likewise, when an examining
15 physician's opinion is not contradicted by another physician, the ALJ may reject
16 the opinion only for "clear and convincing" reasons, and when an examining
17 physician's opinion is contradicted by another physician, the ALJ is only required
18 to provide "specific and legitimate reasons" to reject the opinion. *Lester*, 81 F.3d
19 at 830-31.

20 The specific and legitimate standard can be met by the ALJ setting out a
21 detailed and thorough summary of the facts and conflicting clinical evidence,
22 stating his interpretation thereof, and making findings. *Magallanes v. Bowen*, 881
23 F.2d 747, 751 (9th Cir. 1989). The ALJ is required to do more than offer his
24 conclusions, he "must set forth his interpretations and explain why they, rather
25 than the doctors', are correct." *Embrey v. Bowen*, 849 F.2d 418, 421-22 (9th Cir.
26 1988).

27 **A. Venu Bellum, M.D.**

28 On November 17, 2011, Dr. Bellum sent a letter to the Washington State

1 Department of Social and Health Services stating that Plaintiff had chronic
2 headaches, a seizure disorder, and anemia and “is unable to be gainfully employed
3 due to above medical problems most importantly her seizure disorder.” Tr. 417.
4 The ALJ rejected this opinion for four reasons: (1) Dr. Bellum did not explain his
5 statement with citations to objective medical evidence, (2) Dr. Bellum did not
6 reconcile this opinion with Plaintiff’s daily activities, (3) Dr. Bellum did not
7 reconcile this opinion with his own objective findings that showed Plaintiff’s
8 symptoms were controlled when compliant with treatment, and (4) the opinion
9 “infringes on an issues reserved to the Commissioner under SSR 96-5p.” Tr. 21.

10 Dr. Bellum is a treating provider. In his November 2011 letter, he stated that
11 he had been treating Plaintiff for three years. Tr. 417. The parties appear to agree
12 that the lesser of the two standards, specific and legitimate, are the appropriate
13 standard when discussing Dr. Bellum’s opinion. ECF Nos. 14 at 15, 15 at 21.

14 The ALJ’s first reason fails to meet the specific and legitimate standard.
15 While Defendant is accurate that the Ninth Circuit has held that an ALJ need not
16 credit an opinion that is “conclusory, brief, and unsupported by the record as a
17 whole,” *Batson*, 359 F.3d at 1195, the Ninth Circuit has also found that a
18 conclusory opinion supported by a treating relationship with the claimant and
19 treatment records cannot be rejected simply because it is conclusory. *Garrison v.*
20 *Colvin*, 759 F.3d 995, 1013 (9th Cir. 2014) (An opinion based on significant
21 experience with the claimant and supported by numerous records are entitled to the
22 weight that an otherwise unsupported and unexplained opinion would merit).
23 Here, Dr. Bellum was Plaintiff’s treating provider for an extended period prior to
24 penning the opinion. Tr. 417. While the ALJ asserted that this opinion was
25 inconsistent with his objective findings in his own treatment records, he failed to
26 provide any evidence to support this assertion. *See below*. Therefore, the ALJ’s
27 reliance on a lack of explanation is not legally sufficient to support his
28 determination to reject the opinion.

1 The ALJ's second and third reasons provided by the ALJ for rejecting his
2 opinion fail to meet the lesser standard of specific and legitimate because he failed
3 to set forth a single example or citation to the record to support his assertions. The
4 ALJ is required to do more than offer his conclusions, he "must set forth his
5 interpretations and explain why they, rather than the doctors', are correct."
6 *Embrey*, 849 F.2d at 421-22. It is unclear which of Plaintiff's activities were
7 inconsistent with the opinion, and it is unclear what objective evidence contained
8 in Dr. Bellum's records was inconsistent with his opinion. Armed with nothing
9 more than his conclusions, the ALJ's reasons fall short of the specific and
10 legitimate standard.

11 The ALJ's fourth reason for rejecting Dr. Bellum's opinion, that it infringed
12 on an issue reserved for the Commissioner, also falls short of the specific and
13 legitimate reason. Social Security Ruling 96-5p states that it is the
14 Commissioner's role to determine whether a claimant is "disabled" within the
15 meaning of the Social Security Act. However, S.S.R. 96-5p was rescinded on
16 March 27, 2017 and regulations 20 C.F.R. §§ 404.1527(d), 416.927(d) were
17 enacted which preclude an ALJ from giving any special significant to the source of
18 an opinion on issues reserved to the Commissioner and the opinions themselves are
19 not to be considered medical opinions. Despite the ruling being rescinded, this
20 Court will consider what the ALJ was mandated to follow at the time he rendered
21 his decision and apply S.S.R. 96-5p, which defined a medical source opinion as
22 statements by "acceptable medical sources, including treating sources and
23 consultative examiners, about what an individual can still do despite a severe
24 impairment(s), in particular about an individual's physical or mental abilities to
25 perform work-related activities on a sustained basis," and that "adjudicators must
26 always carefully consider medical source opinions about any issue, including
27 opinions about issues that are reserved to the Commissioner." Therefore, under
28 S.S.R. 96-5p, the ALJ was still required to provide specific and legitimate reasons

1 for rejecting Dr. Bellum's opinion, which he failed to accomplish. *See supra.*
2 Therefore, this claim is being remanded for additional proceedings to address this
3 opinion in full.

4 **B. Richard Sloop, M.D.**

5 Plaintiff also challenged the significant weight the ALJ provided to Dr.
6 Sloop. ECF No. 14 at 15-16.

7 Dr. Sloop is also one of Plaintiff's treating sources. The ALJ stated that he
8 gave significant weight Dr. Sloop's opinion from December 2013 finding that
9 Plaintiff's impairments improved with regular treatment and medication. Tr. 21.
10 However, the December 2013 "opinion" referenced by the ALJ was a "25-minute
11 counselling and coordination of care visit," and not a medical source opinion as set
12 forth in S.S.R. 96-5p.¹ Tr. 607-08. In the report Dr. Sloop specifically stated that
13 Plaintiff's "headaches are much improved over the last two months. She has had
14 only four migraines in two months and then a couple of very small headaches in
15 October and the first of November." Tr. 607. This demonstrates that improvement
16 means symptom reduction, not an eradication, of symptoms. The unanswered
17 question established with Dr. Sloop's report of improvement is what are the
18 functional limitations resulting from four migraines in two months with smaller
19 headaches still being present. It is unclear if migraines and headaches would result
20 in missed work or difficulty concentrating. Dr. Sloop did state that Plaintiff had
21 started a part-time job over the holidays for twenty to twenty-four hours a week as
22 a cashier. Tr. 607. But the record shows that Plaintiff missed work sixteen times
23 between November 5, 2013 and December 15, 2014. Tr. 374.

24 The ALJ erred in his treatment of Dr. Sloop's December 23, 2013 treatment
25 report. First, the report does not constitute a medical source opinion as set forth in
26

27 ¹Considering the rescinded S.S.R. 96-5p is applicable to Dr. Bellum, it is
28 applicable to Dr. Sloop as well.

1 S.S.R. 96-5p. Second, the improvement referenced in the report is a reduction of
2 symptoms, not an eradication of symptoms. This leaves Plaintiff's functional
3 ability unclear. Third, substantial evidence does not support the implied notion
4 that Plaintiff's ability to maintain a part-time position translated into an ability to
5 perform work as defined by the Commissioner. *See* S.S.R. 96-8p (A residual
6 functional capacity is the claimant's ability to perform work activities on a "regular
7 and continuing basis," which means "8 hours a day, for 5 days a week, or an
8 equivalent work schedule.").

9 Upon remand proceedings, S.S.R. 96-5p will not be in effect and that ALJ
10 will have to determine if the treatment note meets the definition of a medical
11 opinion under 20 C.F.R. §§ 404.1520(a), 416.927(a). Therefore, the role of the
12 ALJ will be to interpret the two statements from the treating physicians, Dr.
13 Bellum and Dr. Sloop, and determine the appropriate weight to assign to each
14 qualifying opinion.

15 **C. Jennifer Schultz, Ph.D., and John F. Robinson, Ph.D.**

16 Both Dr. Schultz and Dr. Robinson provided opinions regarding Plaintiff's
17 mental functional capacity. Tr. 92, 95-97, 431-36. The ALJ credited parts of their
18 opinions but uniformly rejected all their functional findings, Tr. 21, and failed to
19 include a single mental limitation in the residual functional capacity determination,
20 Tr. 19. This is incongruent with the finding that "probably anxiety vs epilepsy" is
21 included as a severe impairment at step two. Tr. 18. The Ninth Circuit has held
22 that "[a]n impairment is not severe if it is merely a slight abnormality (or
23 combination of slight abnormalities) that has no more than a minimal effect on the
24 ability to do basic work activities." *Webb v. Barnhart*, 433 F.3d 683, 686 (9th Cir.
25 2005). Therefore, it is inconsistent to have a mental health impairment considered
26 severe at step two but no resulting mental limitation in a residual functional
27 capacity determination. As such, the ALJ is instructed to readdress the opinions of
28 Dr. Schultz and Dr. Robinson on remand.

1 **2. Plaintiff's Symptom Statements**

2 Plaintiff contests the ALJ's determination that her symptom statements were
3 not supported by the record. ECF No. 14 at 6-15.

4 It is generally the province of the ALJ to make determinations regarding the
5 reliability of Plaintiff's statements concerning the intensity and persistence of
6 symptoms. *Andrews*, 53 F.3d at 1039. Absent affirmative evidence of
7 malingering, the ALJ's reasons for rejecting the claimant's testimony must be
8 "specific, clear and convincing." *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir.
9 1996); *Lester*, 81 F.3d at 834; *Trevizo v. Berryhill*, 871 F.3d 664, 678-79 (9th Cir.
10 2017). "General findings are insufficient: rather the ALJ must identify what
11 testimony is not credible and what evidence undermines the claimant's
12 complaints." *Lester*, 81 F.3d at 834.

13 The ALJ found Plaintiff's statements concerning the intensity, persistence,
14 and limiting effects of her symptoms were not fully supported prior to August 27,
15 2014. Tr. 21. The ALJ provided three reasons to support his determination: (1)
16 the medical evidence reflected that Plaintiff's seizures were stable with
17 medication; (2) Plaintiff had been non-compliant with treatment which was
18 inconsistent with her allegations of disabling impairments; and (3) Plaintiff made
19 inconsistent statements to her providers. Tr. 20.

20 Considering the case is being remanded for the ALJ to properly address the
21 medical source opinions in the file, the ALJ is further instructed to make a new
22 determination as to the supportability of Plaintiff's symptom statements in accord
23 with S.S.R. 16-3p. In doing so, the ALJ is to consider and address Plaintiff's
24 limited finances and health insurance during the relevant time period from June 1,
25 2010 to August 26, 2014. *See Gamble v. Chater*, 68 F.3d 319, 321 (9th Cir. 1995)
26 (benefits cannot be denied to a claimant for a failure to obtain treatment he cannot
27 afford).

28 //

REMEDY

The decision whether to remand for further proceedings or reverse and award benefits is within the discretion of the district court. *McAllister v. Sullivan*, 888 F.2d 599, 603 (9th Cir. 1989). An immediate award of benefits is appropriate where “no useful purpose would be served by further administrative proceedings, or where the record has been thoroughly developed,” *Varney v. Secretary of Health & Human Servs.*, 859 F.2d 1396, 1399 (9th Cir. 1988), or when the delay caused by remand would be “unduly burdensome,” *Terry v. Sullivan*, 903 F.2d 1273, 1280 (9th Cir. 1990). See also *Garrison*, 759 F.3d at 1021 (noting that a district court may abuse its discretion not to remand for benefits when all of these conditions are met). This policy is based on the “need to expedite disability claims.” *Varney*, 859 F.2d at 1401. But where there are outstanding issues that must be resolved before a determination can be made, and it is not clear from the record that the ALJ would be required to find a claimant disabled if all the evidence were properly evaluated, remand is appropriate. See *Benecke v. Barnhart*, 379 F.3d 587, 595-96 (9th Cir. 2004); *Harman v. Apfel*, 211 F.3d 1172, 1179-80 (9th Cir. 2000).

17 In this case, it is not clear from the record that the ALJ would be required to
18 find Plaintiff disabled if all the evidence were properly evaluated. Further
19 proceedings are necessary for the ALJ to address the varying accounts of
20 Plaintiff's impairments from her treating providers, to address Plaintiff's mental
21 health impairments and their resulting limitations, and to address the Plaintiff's
22 symptom statements in light of her lack of resources. Additionally, the ALJ is to
23 gather any outstanding records for the period of time at issue, June 1, 2010 to
24 August 26, 2014, and call a medical, a psychological, and a vocational expert to
25 testify at any remand proceedings.

CONCLUSION

27 || Accordingly, IT IS ORDERED:

28 | 1. Defendant's Motion for Summary Judgment, **ECF No. 15**, is

1 **DENIED.**

2 Plaintiff's Motion for Summary Judgment, **ECF No. 14**, is
3 **GRANTED, in part**, and the matter is **REMANDED** to the Commissioner for
4 additional proceedings consistent with this Order.

5 Application for attorney fees may be filed by separate motion.

6 The District Court Executive is directed to file this Order and provide a copy
7 to counsel for Plaintiff and Defendant. **Judgment shall be entered for Plaintiff**
8 and the file shall be **CLOSED**.

9 DATED March 1, 2018.



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11 JOHN T. RODGERS
12 UNITED STATES MAGISTRATE JUDGE
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